COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503
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JOAQUIN KILSON,
Appellant

v. D1-12-326

CITY OF FITCHBURG,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner: Cynthia Ittleman

DECISION ON MOTION TO DISMISS

The Appellant, Joaquin Kilson ("Appellant" or "Mr. Kilson"), filed this appeal pursuant to G.L. c. 31, § 43 with the Civil Service Commission ("Commission") on November 30, 2012 against the City of Fitchburg ("City"), as Appointing Authority for the Fitchburg Police Department ("FPD"), challenging the termination of the Appellant's employment as a Lieutenant in the FPD. On December 17, 2012, the City filed the instant Motion to Dismiss ("Motion"). The Commission conducted a prehearing conference in this case on December 18, 2012. The

Appellant filed an Opposition to the Motion ("Opposition") on January 11, 2013. The Commission conducted a hearing on the Motion on February 4, 2013. The hearing was digitally recorded. On July 17, 2013, the Appellant filed a Supplemental Memorandum ("Supplemental") in further opposition to the Motion stating that the Superior Court upheld an arbitrator's decision that the Appellant's termination was not arbitrable. On October 11, 2013, the Appellant filed a Second Supplemental Memorandum in opposition to the Motion and on October 25, 2013 the Appellant filed a Third Supplemental Memorandum.[1]

Findings of Fact

Giving appropriate weight to the documents submitted by the parties, the parties' arguments, and the inferences reasonably drawn from the evidence, and in view of the applicable statutes and caselaw, I find the following material facts to be undisputed:

1. At all pertinent times, the Appellant was a fulltime, tenured civil service employee of the FPD. (Opposition, Ex. L)
2. On April 13, 2012, the City gave the Appellant a notice of hearing pursuant to G.L. c. 31, § 41, indicating that the City was considering disciplinary action against the Appellant, up to and including termination for alleged violations of FPD's rules and regulations. (Opposition, Ex. L)

[1] The Appellant's Second Supplemental Memorandum in opposition to the Motion asserts that drug charges were dropped against the individual with whom the City alleges the Appellant inappropriately associated and about which association the Appellant allegedly made untrue statements. The Third Supplemental Memorandum asserts that the City's sole witness against the Appellant is the same person who failed to appear in court for the drug prosecution case. For these reasons, the Appellant asserted, at least some of the reasons given by the City for termination of the Appellant's employment fail, warranting a full hearing at the Commission on the remaining merits of this appeal. However, since this decision is based on jurisdiction, I do not address the substantive matters.

3. City Solicitor John Barrett, Esq., conducted the City's hearing on April 26, 2012 at which the Appellant was represented by Fitchburg Police Union ("FPU") attorney Stephen Pfaff. (Opposition, Ex. A)
4. On May 17, 2012, Attorney Barrett issued his report, which concluded that the Appellant had committed six of seven alleged FPD rules violation for which Attorney Barrett stated the City could discipline the Appellant up to and including termination. (Opposition, Ex. L)
5. By letter dated May 18, 2012, the City, through Mayor Wong, notified the Appellant that his employment[2] at the FPD was terminated effective May 18, 2012. *(Motion; Opposition)*
6. Attorney Barrett recommended that the City terminate the Appellant's employment and Mayor Wong adopted Attorney Barrett's findings and recommendations, as evidenced in Mayor Wong's May 18, 2012 letter to the Appellant. (Motion, Exhibit A)
7. The City and the Fitchburg Police Union have a collective bargaining agreement ("CBA") (Opposition, Ex. L)
8. Article V, Section 6 of the parties' CBA is entitled "Civil Service" and it states,

> "Employees shall exercise such rights as are granted by provisions of the Civil Service Statute, rules and regulations promulgated pursuant thereto, and the provisions of section 16 of Chapter 32 of the General Laws as set forth in such statutes, including the rights of appeal, and these matters shall be excluded from the Grievance and Arbitration Procedures of this Contract and an Arbitrator will not have the power to render a decision or an award concerning them."

[2] An arbitrator in the matter indicated that the Appellant's title at the pertinent time was "Acting Lieutenant."

9. By letter dated May 22, 2012, Attorney Pfaff wrote to Chief of Police Robert DeMoura ("Chief DeMoura"),

> "On behalf of the Fitchburg Police Union ('FPU'), and pursuant to the Collective Bargaining Agreement between the FPU and the City of Fitchburg, please accept this Article V, Section 3, Level 1 grievance regarding the termination of Lt. Kilson dated May 18, 2012.
> I further request on behalf of the FPU that this case immediately proceed to arbitration with both the City of Fitchburg and the FPU waiving the remaining levels (Level 2, Level 3, Level 4) of Article V, Section 3, and proceeding directly to Section 4 of Article V.
> Please contact me immediately upon receipt of this letter." (Opposition, Ex. B)

10. By electronic mail dated May 23, 2012, Attorney Pfaff wrote to Chief DeMoura, "Chief – Per my letter to you yesterday, are we in agreement to waive grievance steps/levels and proceed directly to arbitration?" Chief DeMoura responded thereto on May 23, 2012, "John I'm all set if you are".[3] (Opposition, Ex. C)

11. On May 24, 2012, Chief DeMoura responded again to Attorney Pfaff's May 23rd email, "Attorney Barrett will be contacting you as I'm out of town". (Opposition, Ex. D)

12. On May 24, 2012, Assistant City Solicitor Mark Goldstein, Esq., wrote to Attorney Pfaff,

> "I am writing on behalf of the Police Chief, Robert DeMoura, concerning your letter dated May 22, 2012.
>
> The Police Chief does not want to waive the process under Article V, level 2, level 3, and level 4, concerning the above case. …" (Opposition, Ex. E)

13. On June 5, 2012, Chief DeMoura sent an electronic mail message to Attorney Pfaff stating,

> "This letter serves as notification under Article V, Section 3, Level 2, that the Grievance that you filed on May 22, 2012 on behalf of Officer Kilson is denied.

[3] "John" appears to be referring to Attorney John Barrett who is copied on the electronic mail message.

The Grievance, as presented, did not include a brief statement of facts for a response and is therefore denied." (Opposition, Ex. F)

14. On June 15, 2012, FPU President Keith Bourne wrote to Mayor Wong stating,

> "On behalf of the [FPU] and former Lt (sic) Joaquin Kilson, the Union is filing a grievance regarding the termination of Mr. Kilson. Pursuant to the Union's CBA under Article V, level 3 (sic) the Union is forwarding you a copy of the grievance filed under the Union's behalf by our attorney's (sic) Lousin (sic), Costello, Condon & Pfaff, LLP. A copy of the grievance and a copy of Chief Robert DeMoura's response are attached.
>
> The Union objects to Lt (sic) Kilson's termination. The Union objects to the interpretation of the facts, witness testimony and in our opinion, biased proceedings leading to Mr. Kilson's termination. Objections were raised at the commencement of the hearing process. At this time the Union is looking for this process to proceed to arbitration. The Union is not asking for consultation with lawyers prior to proceeding forward to arbitration, thus allowing only 14 days according to the contract for an official response.
>
> Mayor, if you should wish to speak about this matter to either myself or the Union's attorney, Stephen Pfaff, prior to your decision then we are always available." (Opposition, Ex. G)

15. On June 27, 2012, Mayor Wong wrote to Mr. Bourne,

> "I am in receipt of your grievance dated June 15, 2012, on behalf of Joaquin Kilson.
>
> I have reviewed the grievance and, as you will recall, it was my decision as Mayor to appoint the City Solicitor to act as hearing officer in my stead. I believe Attorney Barrett acted in a fair and judicious manner. I therefore feel that your objections with respect to bias are unfounded.
>
> With respect to your opinion as to the interpretation of facts and the witness testimony, you will recall that it was my decision to terminate Lieutenant Kilson after my review of Attorney Barrett's report and the documents supplied by the Police Department in connection with the termination request. I have reviewed all of this material and in light of same, the grievance is denied." (Opposition, Ex. H)

16. On June 29, 2012, Attorney Pfaff wrote to the American Arbitration Association ("AAA") as follows:

> "Pursuant to Article V, Section 3, Level 4 (a copy of which is enclosed), the [FPU] requests arbitration with regard to the [City's] denial of the [FPU's] grievance requesting that the termination of Lt. Joaquin Kilson be overturned. …" (Opposition, Ex. I)

17. CBA Article V, Section 3, level 4 states,

> "If the alleged grievance is not resolved by the Mayor's determination, it may be submitted by the union for arbitration to the [AAA], provided that said application for Arbitration is filed with said Arbitration Association no later than thirty (30) days following the date the Mayor's determination is due. Failure to submit the grievance to arbitration within the time prescribed shall waive the grievance." (Opposition, Ex. I, attachment)

18. On October 10, 2012, Attorney Peter Berry, on behalf of the City, wrote to AAA asking for a continuance of a scheduled AAA hearing on November 8, 2012 " … until the question of substantive arbitrability can be decided by the Superior Court. The City has filed an action in Superior Court pursuant to c. 150(c)(sic), § 2 seeking to stay the arbitration because the City believes that the clear language of the [CBA] between the parties prohibits the Arbitrator from deciding the issue presented in the Demand for Arbitration. …." (Opposition, Ex. J)

19. On October 12, 2012, Attorney Pfaff wrote AAA stating, "Please accept this letter on behalf of the [FPU] as a response to …" the City's request for a continuance of the AAA hearing and it opposes the City's request for a continuance of the AAA hearing.

20. On November 21, 2012, the AAA Arbitrator ruled, in essence, that the matter was not substantively arbitrable because in Article V, Section 6 of the CBA " … the parties plainly and unmistakably indicated that matters within the purview of Civil Service, including terminations, would be exempt from the grievance/arbitration process …" and that the City did not waive the issue of substantive arbitrability, which it could raise at any time in the grievance/arbitration process. (Opposition, Ex. L)

21. On November 30, 2012, the Appellant filed the instant appeal. (Administrative Notice)

DISCUSSION

The Legal Standard for Consideration of a Motion to Dismiss

After the ruling in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007), the Massachusetts Supreme Judicial Court held that an adjudicator cannot grant a motion to dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. *See* Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). At the Commission, the Standard Adjudicatory Rules of Practice and Procedure (hereinafter "Rules") govern administrative adjudication. 801 CMR 1.01, *et seq*. However, Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail; there appears to be no such conflict here. The Rules indicate that the Commission may dismiss an appeal for lack of jurisdiction or in the event the appeal fails to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3).

Applicable Civil Service Law and Collective Bargaining Laws

By statute, appeals of an appointing authority's decision to discipline a tenured civil service employee must be filed " … within ten (10) days after receiving written notice" of a appointing authority's decision to discipline an aggrieved person pursuant to G.L. c. 31, § 41. G.L. c. 31, § 43. The Appeals Court ruled in Town of Falmouth v. Civil Service Commission, 64 Mass.App.Ct. 606 (2002), "When, as here, 'a remedy has been created by statute and the time within which it must be pursued is one of the prescribed conditions under which it can be availed of, the [commission] has no jurisdiction to entertain proceedings for relief begun at a later time.'

Cheney v. Assessors of Dover, 205 Mass. 501, 503 (1910). If the requirements of the statute are not specifically followed, the aggrieved person loses the benefit of the remedy." Id.

In Ung v. Lowell Police Department, D1-08-150 (decided August 20, 2009), the Commission reviewed the intersection of statutes affording civil service employees who are also members of a collective bargaining unit the ability to challenge employment decisions against them pursuant to G.L. c. 31, a civil service statute, and G.L. c. 150E, a collective bargaining statute, among other vehicles for redress. The available remedies are not unlimited; rather, " … a public employee gets only 'one bite at the apple' and must chose (sic) whether to proceed to a public hearing of a civil service appeal or to litigate the grievance before an arbitrator under a collective bargaining agreement. He or she cannot do both." Id. at 7. To this end, G.L. c. 31, § 43 also provides, "If the commission determines that such appeal has been previously resolved or litigated with respect to such [aggrieved] person, in accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with such section, the commission shall forthwith dismiss such appeal." Id. However, G.L. c. 150E, § 8 provides that, " … binding arbitration … shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of section thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one …." G.L. c. 150E, § 8. Under these statutes, the Commission has held that up until the time that a civil service employee elects "binding arbitration" as his or her remedy, the employee may also file an appeal at the Commission where appropriate. Indeed, under G.L. c. 31, § 43, aggrieved civil service employees are *required* to file an appeal at the Commission within the statutory ten-

day period; they are not barred from doing so because they have also filed a grievance. *See* Graver v Springfield Housing Authority, D1-12-161 (decided January 10, 2013).

Analysis

The Appellant cites a series of written communications between Attorney Pfaff, Chief DeMoura, and the Appointing Authority's attorneys to aver that he relied on the Appointing Authority's written statements to indicate that his termination of employment would be grieved and/or submitted for binding arbitration. The Commission, of course, does not have jurisdiction over matters that are determined by collective bargaining agreements.[4] The Appellant's employment was terminated May 18, 2012. Under G.L. c. 31, § 43, the Appellant had ten (10) days within which to file an appeal at the Commission. Four days after the Appellant's termination, Attorney Pfaff wrote to Chief DeMoura asking to grieve the termination under Article V, Section 3, level 1 and to waive levels 2, 3 and 4 of the process. Five days after the termination, Attorney Pfaff wrote to Chief DeMoura again, asking if the parties were in agreement to proceed directly to arbitration. Chief DeMoura wrote back, [Attorney] "John [Barrett] I'm all set if you are[.]" That same day, Assistant City Solicitor Goldstein wrote to Attorney Pfaff, indicating that Chief DeMoura did not want to waive levels 2 through 4. On June 5, eighteen (18) days after the Appellant's termination, Chief DeMoura wrote to Attorney Pfaff denying the grievance. On June 15, twenty-eight (28) days after termination, the union filed a grievance about the termination, indicating the union's interest in proceeding directly with arbitration and that the Appointing Authority had only fourteen (14) days within which to respond. On June 27, the Appointing Authority again denied the grievance. On June 29, Attorney Pfaff wrote to the American Arbitration Association ("AAA") requesting arbitration

[4] The arbitrator ruled on November 21, 2012 that the matter was no arbitrable because of Article V, Section 6 of the CBA.

pursuant to Article V, Section 3, level 4 of the CBA. On October 10, the Appointing Authority's attorney wrote to AAA asking for a continuance on the arbitration proceedings because it had filed a complaint in court asking the court to decide whether the Appellant's termination could be arbitrated. The AAA arbitration proceeded and the arbitrator issued a decision on November 21, 2012. The Appellant did not file his appeal at the Commission until November 30, 2012, which was months after the statutory ten (10) day deadline. While the parties had a number of communications over a number of months, reflecting different positions and arguments, there is nothing in the undisputed communications or otherwise that precluded the Appellant from filing a timely civil service appeal. Indeed, G.L. c. 150E, § 8 and G.L. c. 31, § 43 permit a civil service appeal and grievance process to co-exist up until the point that a party pursues binding arbitration.

The Appellant asks the Commission to extend to this case the Commission's ruling in Ung v Lowell Police Department, D1-08-150. However, the Commission is unable to do so. While it is accurate that both this case and the Ung case include police employment terminations and questions of arbitrability, the commonality ends there as Mr. Ung timely filed his appeal at the Commission but the Appellant here failed to do so. After timely filing his appeal, Ung submitted a letter to the Commission on July 8, 2008 stating that he " … has elected through his collective bargaining agreement to contest the just cause of his termination through arbitration." Ung, p. 2. On the next day, Ung's union filed a demand for arbitration with the AAA. Shortly thereafter, Lowell allegedly informed Ung that his termination was not arbitrable under the CBA. Days later, the Commission dismissed Ung's appeal based on his voluntary withdrawal of appeal. Thereafter, Lowell opposed arbitration and filed a complaint in Superior Court to stay the arbitration; Lowell prevailed. Ung then filed a motion to re-open his appeal at the

Commission and the union sought appeal of the Superior Court ruling. In view of the facts in Ung, the Commission made a rare exception to its rulings so that Mr. Ung would be allowed to re-open his Commission appeal under precise restrictions because Mr. Ung had initially filed a timely appeal.

I note that the Worcester Superior Court agreed with the Arbitrator that the Appellant's termination was not arbitrable. *(Appellant's Supplemental Memorandum in Opposition to the Motion to Dismiss, Attachment)* The Judge's decision was brief, stating, "This action came on before the Court, Shannon Frison, Justice, presiding, on the Defendants' Motion for Judgment on the Pleadings Under (sic) M.R.C.P. 12 (c) and after hearing and the Court having ALLOWED said motion, It is ORDERED and ADJUDGED: That the Decision of the Arbitrator that the matter was not arbitrabal (sic) is hereby CONFIRMED." The date of the decision is June 6, 2013. Attached to the Court's decision is a "Clerk's Notice[,]" which states, " … After hearing, ALLOWED. Judgment for defendants on the pleadings. Matter is subject to Civil Service Commission. Arbitrator's decision that matter not arbitable (sic) was lawful. (Shannon Frison, Justice) …." I read the Clerk's Notice to mean that the Court's decision upheld the arbitrator's finding that, under Article V, Section 6 of the CBA, the Appellant's termination was to be addressed via a civil service appeal and not arbitration, and not that the Court's decision waived the statutory filing deadline in G.L. c. 31, § 43 thereby granting the Commission jurisdiction over the Appellant's employment termination. Further, the Court decision was rendered July 16, 2013, approximately seven (7) months after the Appellant filed his appeal at the Commission. This is but one indication of the difference between the schedules involved in arbitrations and civil service cases, and another reason the Commission cannot hold the door open for civil service appeals beyond the this point while awaiting arbitration determinations.

Conclusion

Based on the foregoing, the Appellant's claims fail to raise a right to relief above the speculative level based, even assuming the Appellant's claims are true, and the Commission has no jurisdiction to consider the Appellant's appeal. Therefore, the Appointing Authority's ***Motion is granted*** and the appeal is ***denied***.

Civil Service Commission

_____
Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on February 6, 2014.

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten (10) days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty (30) day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:
Stephen Pfaff, Esq. (For Appellant)
Peter Berry, Esq. (For Respondent)
Mark A. Goldstein, Esq. (For Respondent)